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BEFORE THE  
ALABAMA PUBLIC SERVICE COMMISSION

PROPOSED REVISIONS TO THE )  
PRICE REGULATION AND )  
LOCAL COMPETITION PLANS )

DOCKET 28590

REPLY COMMENTS ON THE REVISED ATRP



On behalf of Alabama consumers, the Attorney General submits the following reply comments on the proposed revisions to the Alabama Telecommunications Regulation Plan (the "ATRP") adopted by the Commission on July 25, 2004. The PSC staff suggested the proposed revisions attached as Appendix A to the November 5, 2004 order of the Public Service Commission in Docket 28590. The position of the Attorney General on the revisions proposed by the staff remains the same as the position outlined in the Comments on the Revised ATRP filed in this docket on November 22, 2004. This reply addresses only issues presented in the comments of other interested parties.

**TIMING**

One of the central issues of dispute among the interested parties is whether the Commission should approve the ATRP immediately. For various reasons, including possible federal regulatory changes, some parties have recommended that the PSC defer action in this docket. The Attorney General opposes any attempt to wait on the federal government before approving the ATRP. The PSC approved the current regulatory plan on September 20, 1995, several months before Congress passed the 1996 Telecommunications Act. The ATRP provides a procedure for reviewing and revising the ATRP when there are federal regulatory changes. ATRP, at ¶ 14C. There is always

the possibility that a state regulatory plan will need revision because of federal regulatory changes. The State of Alabama must not defer a decision in this docket because of the possibility that the ATRP may need updating at some point in the future.

### TARIFFS

The Commission must address the issue of presumptively valid tariffs by explicitly including in its order that tariffs filed with the PSC, but not approved by the Commission, are not presumptively valid. BellSouth, in its comments, states that "the Staff proposal does not fully embrace the concept of presumptively valid tariffs upon filing..." BellSouth Telecommunications, Inc., Comments in Response to the Staff's Recommended Revisions to the Alabama Telecommunications Regulation Plan, Docket 28590, at 3 (November 23, 2004). The independent telephone companies argue that their "service prices...should be considered presumptively compliant with [the TSLRIC] requirement if they are at or above prices for comparable BellSouth services." Comments of the Non-BellSouth ILECs, Docket 28590, at 13 (November 23, 2004). The concept of a presumptively valid tariff is a fiction. Why would a price be presumptively valid just because the company filed the price with the Commission? Why would a cost study be presumptively compliant with the ATRP, if based on the costs of another company?

A tariff **approved** by order of the PSC is presumptively valid when challenged in court. Tariffs filed, but not expressly approved by a vote of the Commission, are not presumptively valid. The Commission must make this concept explicit in the ATRP. Otherwise, consumers will never be able to question or challenge a price because the price will be presumptively valid.

The ATRP gives every company the right to set its prices. If the Commission does not clarify the "presumptively valid" issue, the companies will be free to set any price and consumers will not be able to challenge the price. If the telecommunications market were fully competitive, the consumer might be able to find a better price for a service from a different company. However, many consumers do not have the possibility of obtaining telephone service from another provider. The Commission must ensure that consumers are able to contest prices under Section 37-1-83 of the Alabama Code or any other applicable provision of state or federal law. Ala. Code §37-1-83 (1992).

#### **REGULATORY BURDENS**

The Attorney General supports any effort to decrease the cost of regulation. Every company complains about the cost of regulatory compliance. As the gap narrows between ILECs and CLECs, the ILECs will have less regulation. Under the ATRP, the CLECs have more regulatory requirements. The new CLEC requirements are similar to those already required of ILECs because the ATRP attempts to level the playing field between ILECs and CLECs by requiring CLECs to comply with certain ILEC regulations.

In imposing new requirements on CLECs, it is very important to ensure that the Commission needs the additional reporting and that consumers will benefit from the additional regulatory requirements. For example, Knology of Alabama, Inc. complains that the ATRP imposes a price floor on competitive service offerings when the provider has insignificant market power. Comments of Knology of Alabama, Inc., Docket 28590, at 6 (November 23, 2004). *See also* Comments of BellSouth Long Distance, Inc., Docket 28590, at 2-5 (November 22, 2004). While the PSC staff has never explained publicly

the reasons for the new CLEC pricing requirements, it is important for the Commission to ensure that the staff is not using traditional regulatory principles in drafting the CLEC Price Flexibility Plan.

Under traditional regulation, the PSC devised rules for the ILEC, a monopolist, to simulate a competitive environment. A utility that has little or no market power, and is, in fact, the competitor in a competitive market does not need to adhere to rules devised for a monopolist. *See* AT&T Response to Order Seeking Comments on the Revised ATRP, Docket 28590, at 5-6 (November 23, 2004). The staff has never explained whether consumers will benefit from a CLEC price floor, particularly when a CLEC is bundling its regulated services with non-regulated communications services. There is no doubt that the rule requiring pricing services above TSLRIC has been a sound rule for many years, the question is whether the rule is sound for CLECs in the current environment.

Reporting requirements may be burdensome for small companies. This is true for small ILECs and small CLECs. *See e.g.*, Comments of the Non-BellSouth ILECs, Docket 28590, at 12 (November 23, 2004). The Attorney General supports any effort to reduce the reporting requirements for small companies as long as the information remains available, when needed, for the Commission staff. When a reporting requirement involves a matter that is not necessarily an issue for small companies, the Attorney General supports relaxing the reporting requirements. Small companies are facing so many critical issues in today's marketplace that they need to focus only on the most relevant regulatory issues. Furthermore, they have fewer customers over which to spread the costs of regulation.

When regulated telephone service is only a small part of a communications bundle, as it is in many CLEC offerings, the costs of regulation may exceed any benefit from the regulation. Although the Attorney General does not support creating two categories of CLECs, small and large, for regulatory purposes, the Attorney General does agree with ITC^DeltaCom's reasoning for avoiding more detailed regulation of smaller companies. Comments of ITC^DeltaCom Communications, Inc., Docket 28590, at 2-4 (November 23, 2004). If Alabama ever has a significant number of large CLECs, as defined in ITC^DeltaCom's comments, the mere presence of these CLECs would be evidence of competition. If there were more competition, there would be less need for traditional regulation and no need for a large CLEC designation.

#### **CONTRACTS, CUSTOMER AGREEMENTS, AND CONTRACT SERVICE**

##### **ARRANGEMENTS**

The ATRP defines only the Contract Service Arrangement ("CSA"). A utility files information on a CSA with the PSC in a manner similar to a tariff filing subject to proprietary rules. For regulatory purposes, the CSA is almost a tariff equivalent. Some traditional regulatory rules applicable to a tariff undoubtedly would apply to a CSA. Some of the comments recommend use of terms, such as "customer agreement" or "contract arrangement" or "contractual arrangement." The ATRP does not define these terms and, if the Commission inserts these terms in the ATRP at the last minute, consumers may lose some regulatory protections that they have under the tariff and CSA filings.

The suggested contractual terms occur in the proposals to avoid giving the customer a refund when they do not want a service at an increased price. BellSouth Long

Distance, Inc. objects to Part V, Section 4B authorizing a refund, if customers subscribe to its service under a "contractual arrangement." Comments of BellSouth Long Distance, Inc., Docket 28590, at 6 (November 22, 2004). BellSouth Telecommunications, Inc. objects to the same provision and, in proposed footnote 15 of Exhibit A, they recommend "This provision shall not apply to customers who subscribe to BellSouth's services pursuant to a contract arrangement." BellSouth Telecommunications, Inc.'s Comments in Response to the Staff's Recommended Revisions to the Alabama Telecommunications Regulation Plan, Docket 28590, Exhibit A, at 15 n.15 (November 23, 2004). Knology objects to the same provision in Exhibit A, page 7, paragraphs 8A and 8B and suggests the language "Unless otherwise provided for in a customer agreement" to avoid giving notice of price increases **and** giving refunds under the ATRP. Comments of Knology of Alabama, Inc., Docket 28590, Exhibit A at 7 (November 23, 2004). The provision authorizing refunds when consumers do not want to pay an increased price must not be gutted by allowing the companies to contract around the ATRP.

There has been no discussion in any of the workshops about the use of contract and customer agreements to avoid ATRP requirements. If the Commission allows companies to contract with customers outside of the regulatory plan and further allows the contracts to supercede the requirements of the plan, the ATRP will not provide any protection for Alabama consumers. Essentially, the companies will have the protection of the filed rate doctrine, an exemption from Alabama consumer protection laws and regulations, and the ability to contract independently with each customer. The PSC must not approve this major departure from Alabama regulatory law without significant study. When the PSC determines that utilities may contract directly with consumers, tariffs must

be abolished, the filed rate doctrine eliminated, and the exemption utilities enjoy under Alabama law from consumer protection laws and regulations must be eliminated.

### **PRICE CAPS**

The ATRP authorizes every telephone company in the State of Alabama to increase prices without requiring any telephone company to justify the increased prices. Under the 1995 price regulation order, the focus of the PSC was on the prices charged for services, not on the earnings of telephone companies. The 1995 Local Competition Order specifically provided that the “Commission will remain actively involved in public interest concerns, such as what consumers pay.... With price regulation, prices charged to customers become the financial focus of the commission, rather than the earnings of the LECs.” 1995 Local Competition Report and Order, PSC Dockets 24499, 24472, 24030, 24865, at ¶ 17 (September 1995).

On July 25, 2004, this Commission abolished traditional price regulation in Alabama and instituted a new form of regulation, under the provisions of Code of Alabama 1975, §37-1-80(b) (1992), and known as the ATRP. Under the ATRP, the Commission will no longer focus on the prices charged to consumers; instead, this plan pre-approves rate increases for at least the next five years. The price increases approved in the plan do not require a vote of the Commission before a telephone company implements the increases.

The price caps in the ATRP are so high in some areas of the state that the independent telephone companies consider their own regulatory plan to be punitive because they can not take advantage of similar high pricing limits. Comments of the Non-BellSouth ILECs, Docket 28590, at 10-11 (November 23, 2004). The PSC staff

needs to explain to the independent telephone companies and to consumers the reasons for recommending the disparate pricing percentages between Tier II and Tier III. Why would a telephone company in Tier II be able after five years to increase prices by 25 percent annually? Many Alabama consumers would agree that the pricing percentage limits in Tier II are punitive. The fact that the PSC staff provides no explanation for these percentage limits only increases the concern that the percentage limits are arbitrary.

If the pricing rules in the ATRP rely on economic data submitted in Docket 28590, there has been no explanation of the connection or reliance on that data in development of the pricing rules. There has been no evidence or study of the appropriate percentage increases for telecommunications services. At a minimum, the Commission must create a record whereby the staff, at least, explains how they developed the appropriate price caps.

The pricing rules in the ATRP provide very few safeguards for consumers. The staff developed the ATRP in meetings with representatives of various telephone companies. To our knowledge, the staff never solicited or consulted with any consumer group or representatives before the plan's adoption in July 2004.

#### **RURAL SERVICE AREAS**

One of the most complex and challenging issues confronting the State of Alabama today is the provisioning of utility services in the rural areas. Unfortunately, the ILEC Price Flexibility Plan does not really protect consumers and may not really be available, according to its stated terms, for most independent telephone companies. The ILEC Price Flexibility Plan seems to be an attempt to give other ILECs a plan similar to the one developed for BellSouth. The Attorney General does not support the ILEC Price



Flexibility Plan. The Attorney General will work with the independent telephone companies to develop regulatory plans that meet the needs of the independent telephone companies and protect their consumers.

#### CONCLUSION

Unfortunately, today, the telecommunications market in Alabama is still transitioning to a fully competitive market. There is competition in some markets and only limited competition in other markets. If all of the competitors were regulated companies, there might be more agreement on the transitional rules. Every regulated company is facing competition from non-regulated communications companies. Alabama consumers will benefit when the rules for regulated companies allow these companies to fully participate and compete with non-regulated companies in the national communications market.

The Attorney General, respectfully, requests that the Commissioners review our initial Comments on the Revised ATRP and these reply comments and incorporate the suggested changes before approving the ATRP at the next commission meeting.

Respectfully submitted,

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ATTORNEY GENERAL




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## CERTIFICATE OF SERVICE

We have not served any copies of this Reply Comment but will provide copies upon request.

Dated this 7th day of December, 2004.

  
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